States Court of Appeals is filed simultaneously with this memorandum.

III.

New Argument Raised Under "Argument."

The mandate of the Court of Appeals is merely interlocutory in form. It is final in subtance. This case is ripe for review. *Accordingly, Brotherhood of Locomotive Firemen and Engineman* v. *Bangor & A.R.R.* 389 *U.S.* 327 (1967) (*per curiam*) *is distinguishable.* The fact that all orders below are now final is also a distinction.

In *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U.S. 251, the first petition for *certiorari* was denied before trial court action on the mandate of the Court of Appeals. The opinion of Mr. Justice Pitney indicates that *certiorari* was denied initially for lack of a substantial question.

> "The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application, besides which, it appears, by reference to our files, that the application was opposed by the present petitioner upon the ground that the case, however important to the parties, involved no question of public interest and general importance, nor any conflict between the decisions of State and Federal courts, or between those of Federal courts of different circuits."

This case is postured differently. The district court has acted on the mandate and it is a practical futility to seek review in the Court of Appeals of the very issues that Court decided against this petitioner.

Respondents acknowledge that this case presents a "fresh constitutional matter." They assert, at the same

time, that such matter coming before this Court after 183 years under the Constitution thereby demonstrates a lack of urgency which militates against granting the writ. The argument is that a "fresh constitutional matter" is not to be reviewed by this Court because it is fresh and it suggests an unwritten "statute of limitations" on the judicial Power of the United States. These propositions may be dismissed as absurdities. Petitioner submits that Article I, Section 2, Clause 4 has never before been questioned because of longstanding recognition by Congress of the principle of federalism which has vested discretion in state executive authority, coupled with recognition by the courts of lack of jurisdiction and want of justiciability. The advent, after 183 years, of this confrontation of state executive authority by the federal judicial power proclaims an urgent necessity to grant the writ.

We now turn to Respondents' facile but fallacious assertions that: 1. The Governor's refusal to issue a writ of election was clearly unconstitutional; 2. The District Court clearly had original jurisdiction and could grant relief; and 3. The subject matter is justiciable.

1. The Constitutionality of Governor's Refusal To Issue A Writ Of Election.

A recurrence to the fundamental principle of federalism gives cogent support to the Governor's exercise of discretion and endorses his conduct as constitutional. Papers No. 52 through No. 59 of the Federalist are a detailed discussion of the House of Representatives. They impliedly support virtual representation in the event of vacancy. In brief, the fact that biennial elections are unalterably fixed and thus secure the liberty of the people, the fact that the primary purpose and intent was to provide the national

government with "the means of its own preservation," the fact that more frequent elections were regarded as undesirable from the viewpoint of distances to travel and from the viewpoint of investigation and annulment of spurious election—not only support virtual representation but also give a perspective to Article 2, Section 2, Clause 4 which the Court of Appeals clearly did not consider. That perspective is this—that the mandate of the word "shall" as used in the phrase—"the Executive Authority thereof shall issue Writs of Election—is not an imperative addressed to the immediacy of filling a vacancy, but rather to the exclusive manner of filling a vacancy, (*i.e.* by election), when and if filled.

Mr. Justice Story's Commentaries on the Constitution refute respondents' glib conclusion that the refusal to issue a writ of election was clearly unconstitutional.

> "§ 684. The next clause of the second section of the first article is: 'When vacancies happen in the representation of any State, the executive authority thereof shall issue writs of election to fill such vacancies.
>
> "§ 685. The propriety of adopting this clause does not seem to have furnished any matter of discussion, either in or out of the convention. It was obvious that the power ought to reside somewhere; and must be exercised by the State or national government, or some department thereof. The friends of State powers would naturally rest satisfied with leaving it with the State executive; and the friends of the national government would acquiesce in that arrangement, if other constitutional provisions existed sufficient to preserve its due execution. *The provision, as it stands, has the strong recommendation of public convenience, and facile adaptation to the particular local circumstances of each state. Any general regulation would have worked with some inequality.*" [Emphasis added.]

It is clear then that this clause is not a general regulation and that, in having regard of public convenience and particular local circumstances of each state, it contemplates a discretion in the state executive wherein the power resides. The constitutional provision which preserves its due (*i.e.* proper, suitable and rightful and not necessarily immediate) execution is Section 4 of Article I. In regard to this section Mr. Justice Storey comments as follows:

> "§ 814. The first clause of the fourth section of the first article is as follows: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof. But the Congress may, at any time, by law, make or alter such regulations, except as to the place of choosing senators."
>
> "§ 815. This clause does not appear to have attracted much attention, or to have encountered much opposition in the convention, at least so far as can be gathered from the journal of that body. But it was afterwards assailed by the opponents of the Constitution, both in and out of the State conventions, with uncommon zeal and virulence. The objection was not to that part of the clause which vests in the State legislatures the power of prescribing the times, places, and manner of holding elections; for so far it was a surrender of power to the State governments. But it was to the superintending power of Congress to make or alter such regulations. It was said that such a superintending power would be dangerous to the liberties of the people and to a just exercise of their privileges in elections. Congress might prescribe the times of elections so unreasonably as to prevent the attendance of the electors, or the place at so inconvenient a distance from the body of the electors as to prevent a due exercise of the right of choice. And Congress might contrive the *manner* of holding elec-

tions so as to exclude all but their own favorites from office. They might modify the right of election as they should please; they might regulate the number of votes by the quantity of property, without involving any repugnancy to the Constitution. These and other suggestions of a similar nature, calculated to spread terror and alarm among the people, were dwelt on with peculiar emphasis."

"§ 816. In answer to all such reasoning, it was urged that there was not a single article in the whole system more completely defensible. Its propriety rested upon this plain proposition, that every government ought to contain in itself the means of its own preservation. If, in the Constitution, there were some departures from this principle, (as it might be admitted there were,) they were matters of regret, and dictated by a controlling moral or political necessity, and they ought not to be extended. It was obviously impracticable to frame and insert in the Constitution an election law which would be applicable to all possible changes in the situation of the country, and convenient for all the States. *A discretionary power over elections must be rested somewhere.* There seemed but three ways in which it could be reasonably organized. It might be lodged either wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last was the mode adopted by the convention. The regulation of elections is submitted, in the first instance, to the local governments, which, in ordinary cases and when no improper views prevail, may both conveniently and satisfactorily be by them exercised. But in extraordinary circumstances, the power is reserved to the national government, so that it may not be abused, and thus hazard the safety and permanence of the Union."

Reason requires that the biennial election clause; the vacancy clause and the election provisions of Article I,—

all be read together. Upon such reading these conclusions appear inescapable as to the accommodating federal plan.

1. Fixed biennial elections secure the safety and permanence of the Union. Interim vacancy elections are not essential to this end.

2. The holding of elections is placed primarily within the province of the States.

3. As an additional safeguard, Congress, *not the federal judiciary*, has a reserved power to regulate the holding of elections.

4. This reserved power in Congress is to be exercised only in extraordinary circumstances.

It further appears that in regard to interim vacancies in the House of Representatives such extraordinary circumstances as hazard the safety and permanence of the Union or the right of the people to choose their representatives have never happened so as to require affirmative regulation by Congress.

We are not concerned here with congressional district mal-apportionment and consequent vote-diluting discrimination as in *Wesberry* v. *Sanders*, 376 U.S. 1. We seriously doubt that the aspects of the First Article in issue in this case were within the contemplation of Mr. Justice Black in presenting the majority opinion and a review of the history of the Great Compromise. The issues here are most worthy of distinct consideration regardless of the "one person, one vote" principle of *Gray* v. *Sanders*, 372 U.S. 368, intrinsic to the other cases cited by respondents because there is a generic difference between the right to vote and the right to hold an election.

2. The District Court's Jurisdiction And Power To Grant The Relief Requested.

It is far from clear and, indeed, petitioner denies that the express language of 28 U.S.C. section 1343 (jurisdiction) and 42 U.S.C. 1983 (cause of action) confers district court jurisdiction without regard to an express or notorious, antecedent judicial recognition of the right asserted. The fact that the Court of Appeals rejected our argument, *sub silencio*, is some evidence of doubt as to jurisdiction. The Court of Appeals based its finding of jurisdiction on analogy to *Wesberry* v. *Sanders*. We have heretofore demonstrated the deficiencies of such analogy. *Monroe* v. *Pape*, 365 U.S. 167, properly based jurisdiction on antecedent fundamental 4th and 14th Amendment rights against unreasonable search and seizure. *Baker* v. *Carr*, 369 U.S. 186, opened the jurisdictional Pandora's box which we now seek to close.

Baker v. *Carr* was initially submitted under 28 U.S.C. 1343(3) to the United States District Court for the Middle District of Tennessee, and there was dismissed for want of jurisdiction of the subject matter and also on the ground that no claim was stated upon which relief could be granted (179 F. Supp. 824). The Supreme Court over ruled on these points. The eight Justices participating in the decision filed six distinct opinions. Justice Brennan discussed the question of jurisdiction. His views must be taken as the opinion of the Court on the subject although it appears that his Brethren gave limited attention to the subject. Justice Brennan did recognize that a cause presented must be described in a jurisdictional statute (p. 198) and held the complaint "within 28 U.S.C. 1343." He recognized the antecedent force of the phrase authorized by law. (see footnote 18 p. 200 specifically referring to 42 U.S.C. 1983).

He cited the following cases in support of District Court jurisdiction under 28 U.S.C. 1343(3) *Douglas* v. *Jeannette*, 319 U.S. 157; *Stefanelli* v. *Minard*, 342 U.S. 117; *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Snowden* v. *Hughes*, 321 U.S. 1; *Smith* v. *Allwright*, 321 U.S. 649; *Monroe* v. *Pape*, 365 U.S. 167; *Egan* v. *Aurora*, 365 U.S. 514.

Douglas v. *Jeannetti* is founded on express First Amendment rights of freedom of speech, press and religion; *Stefanelli*—unlawful search, a fundamental Fourth Amendment right; *Nixon* v. *Herndon*—the Fifteenth Amendment right to vote; *Nixon* v. *Condon*—the same; *Smith*—the same; *Monroe*—illegal search and arrest contra the Fourth Amendment; and *Egan*—speech and assembly. *Snowden* stands apart, judgment therein was "*affirmed for failure to state a cause of action within the jurisdiction of* the District Court."

The other cases cited in reliance by Justice Brennan are *Wood* v. *Broom*, 287 U.S. 1; *Mahan* v. *Hume*, 287 U.S. 575; *Colegrove* v. *Green*, 328 U.S. 549; *Cook* v. *Fortson*, 329 U.S. 675; *Turman* v. *Duckworth*, ibid; *Colegrove* v. *Barrett*, 330 U.S. 804; *Tedesco* v. *Board of Supervisors*, 339 U.S. 940; *Remney* v. *Smith*, 342 U.S. 916; *Cox* v. *Peters*, 342 U.S. 936; *Anderson* v. *Jordan*, 343 U.S. 912; *Kidd* v. *McCanless*, 352 U.S. 920; *Radford* v. *Gary*, 352 U.S. 991; *Hartsfield* v. *Sloan*, 357 U.S. 916; *Matthews* v. *Handley*, 361 U.S. 127.

Wood v. *Broom*: The opinion is silent as to jurisdiction but the argument indicates that *an amount in controversy was alleged*. The case was summarily reversed with direction to dismiss.

Mahan v. *Hume*: Is a per curiam decision following *Wood* v. *Broom* also totally silent as to jurisdiction.

Colegrove v. *Green*: Supreme Court affirmed dismissal below by a three-judge court. The opinion of the district court three judges 64 F. Supp. 632 does not respond directly to the defendant's motion to jurisdiction, it merely states a paradox without suggesting its resolution (p 635).

Cook v. *Fortson and Turman*: Are per curiam decisions, quite silent as to jurisdiction.

Colegrove v. *Barrett*: Another concurrence, per curiam, with a dismissal below for want of a substantial federal question.

Tedesco: Another per curiam decision; "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

Remmey: The same as above.

Cox: the same as above.

Anderson: The same as above.

Kidd: The same as above.

Radford: The same as above.

Hartsfield: This citation is an order, entirely cryptic as to our subject matter.

Matthews: Another decision per curiam, quite silent as to jurisdiction.

Justice Brennan speaking of these cases recognized that they were decided in summary per curiam statements (p. 202) making the doubtful point: "None was dismissed for want of jurisdiction of the subject matter." Since these cases were, in fact, consistently dismissed for want of a substantial federal question, his statement, we submit, is essentially an exercise in semantics.

The Justice concludes his dissertation on Jurisdiction of The Subject Matter by relying on the implications that

there is subject matter jurisdiction found in *MacDougall* v. *Green*, 335 U.S. 281 and *South* v. *Peters*, 339 U.S. 276.

In *MacDougall* the district court expressly found want jurisdiction and denied an injunction, 80 F. Supp. 725, and that judgment was affirmed.

In *South* a dismissal was also affirmed. Thus it would appear that the inferences drawn by the Justice are gratuitous.

We submit that the foregoing disposes of *Baker* v. *Carr* as authority against our thesis and demonstrates that in that case, as in *Brown* v. *Board of Education*, jurisdiction under 28 U.S.C. 1343(3) was dogmatically found out of zeal to reach the issues without delay. Certainly, our present thesis was neither presented nor considered and in regard to the seven cases specifically cited in support of 1343(3) jurisdiction, they give credit to our view that an established right in esse must be found.

We regret having to include in this memorandum the foregoing material more appropriate to a brief on the merits but submit that it was incumbent on us to reply, at least in part, to respondents' unequivocal declaration that "the lack of merit of the 'antecedent recognition' argument of petitioner is amply demonstrated."

Respondents compare *Minersville School District* v. *Gobitis*, 310 U.S. 586 with *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 to demonstrate lack of merit in our jurisdiction argument. It is true that Gobitis ruled that first amendment rights of the free exercise of religion did not control a state requirement that the national flag be saluted regardless of religious convictions and that Barnette reversed that rule. The former decision did not bar jurisdiction in the latter case which sub-

stantially asserted a non-existent right. But there is no indication in the decisions in *West Virginia* v. *Barnette* 319 U.S. 624 that jurisdiction was challenged. Indeed in turning to *Barnette* v. *West Virginia*, 47 F. Supp. 251, we find on page 252, that "*no question is raised as to jurisdiction*" *and that original jurisdiction was founded on the then requisite amount in controversy.* (Emphasis added).

There is dicta by the three judge court to the effect that there is jurisdiction irrespective of the amount involved. But the fact remains that no question was raised as to jurisdiction under color of law and the court did not examine the issue. We believe that, absent the requisite amount in controversy, jurisdiction may have been successfully challenged by our "antecedent recognition" theory because the consequences of dismissal for want of jurisdiction would not have been either untoward or severe on plaintiff. Plaintiff would have filed a new suit in state court, prosecuted state appeal and, upon a highest state court ruling upholding the validity of the statute, prosecuted appeal to this Court as a matter of right. The outcome would have been the same. There would have been a delay of vindication.

Such delay attributable to statutory jurisdictional requirements in cases involving clear adverse precedent is not unwarranted and is further justified by the benefit of a clear definition of jurisdiction. Original district court jurisdiction as now *undefined* invites any and all cases where vague allegations of denial of due process or equal protection may be made.

In regard to the remedy, it is noted that the cases cited by respondents with the exception of *Williams* v. *Rhodes*, 393 U.S. 23, do not involve affirmative orders to state

executive authority in the nature of mandamus compelling affirmative action.

Sterling v. *Constantine*, 287 U.S. 378 enjoined the Governor of Texas from enforcing orders limiting production of oil. This is not, of course, mandamus.

Walkley v. *Muscatine*, 73 U.S. 481 is pure dicta on the subject of mandamus since it affirmed a dismissal below without affording a remedy.

Bell v. *Hood*, 327 U.S. 678 was an action against *federal agents* of the F.B.I. and by dicta speaks only of restraining state officers from doing what the 14th Amendment forbids the state to do (page 684). Again, it is not mandamus.

United States v. *Oregon Medical Society*, 343 U.S. 326 obviously does not involve a state officer or agency.

As to *Williams* v. *Rhodes*, 393 U.S. 23, the preliminary ruling on a motion for temporary injunction made by Mr. Justice Stewart, 89 S. Ct. 1 et seq., clearly shows that the state executive authority did not question the power of the court to grant the relief sought. We have for some time been intrigued by the cryptic language of Mr. Justice Stewart, viz.

> "The parties have not questioned my power to grant the relief sought, but I believe that such power should be used sparingly and only in the most critical and exigent circumstances. With that in mind, I have consulted with every member of the court, except Mr. Justice Douglas, who is unavailable, and am authorized to state that all of them are of the opinion that an early hearing and a prompt and effective decision of this appeal are highly desirable."

We do agree, if such be the meaning of the language above, that power that is not questioned, if non-existent,

should indeed be used sparingly and only in the most critical and exigent circumstances. We note that Mr. Justice Stewart did not comment on the views of his brethren as to the exercise of the power and that "counsel (are) agreed that in the absence of a temporary order by me, at this time, difficult if not insurmountable practical problems in the preparation of the ballot would result."

In all due respect, here petitioner does not, Barkus-like, agree. We are unwilling to do so and seek an explicit ruling on the validity of the affirmative remedy mandated and used below.

3. The Subject Matter Is Clearly Justiciable?

Beyond the specific categories of non-justiciable subject matter enumerated by respondents; *Baker v. Carr*, 369 U.S. 186 (1962) pronounces a number of formulations which if inextricable from a case at bar indicate the propriety of dismissal for non-justiciability on the ground of a political question's presence. These formulations are enumerated (369 U.S. at 217) as follows:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department;

2. or, a lack of judicially discoverable and manageable standards for resolving it;

3. or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

4. or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government;

5. or an unusual need for unquestioning adherence to a political decision already made;

6. or, the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

By these criteria, we can say—"Stand Up! Hats off! We are again, at long last, in the presence of that rare thing, a true and palpable political question."

CONCLUSION

The issues are properly presented for review. The opinion of the Court of Appeals in this case of "fresh constitutional matter," is not correct. We respectfully ask that the Petition for Writ of Certiorari be granted.

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